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## RESTRAINTS UPON THE ALIENATION AND ENJOYMENT OF ESTATES.

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20. The object of most of the restraints imposed upon estates, is to protect them for the benefit and enjoyment of the beneficiary. We have seen that where this is the manifest and admitted intent of the grantor, it has often failed in the expected result. In guarding them against voluntary alienation, no barrier was erected against those acts and operations of the law which swept them from the intended beneficiaries. We have seen that while simple restraints may be sufficient to protect the beneficiary from his own acts, they are utterly powerless to save him against those processes of the law which are controlled by his creditors. All attempted exemptions from involuntary alienation are void as against the policy of the law, irrespective of the nature of the estate to which they are attached. In other words, no estate can be vested so as to continue in the beneficiary, and still be safe from his debts and liabilities.

21. But it often happens (and the law affords no exception to this truth) that what cannot be attained directly, may be safely reached by indirect approaches. By the employment of words and phrases slightly different, the admitted intention of the donor to secure his gift against the claims of creditors, may

be carried out, although it may often fail in preserving anything for the beneficiary. This result is effected by the use of certain clauses which direct a convenient termination of the estate, so as to leave the creditor without anything to proceed against.

No proposition is better settled in the law than that a life interest may be so created and conferred as to be determinable upon the event of the donee's bankruptcy or insolvency, or any act of voluntary alienation on his part: *Churchill* v. *Marks*, 1 Coll., 441; *Brandon* v. *Robinson*, 18 Ves., 429; *Lewis* v. *Lewis*, 6 Sim., 304; *Shee* v. *Hale*, 13 Ves., 404; *Cooper* v. *Wyatt*, 5 Mad., 489; *Doe* v. *Clarke*, 8 East, 186; *King* v. *Topping*, McClell. & Y., 558; *Dommet* v. *Bedford*, 6 T. R., 684; *Pym* v. *Lockyer*, 12 Sim., 394; *Higginbotham* v. *Holmes*, 19 Ves., 88; *Yarnold* v. *Moorehouse*, 1 Rus. & My., 364; *Wilson* v. *Greenwood*, 1 Swanst., 471; *Exparte Boddam*, 2 D. G. F. & J., 625; *Muggeridge's trust*, Johns. (Eng.), 625; *Martin* v. *Margham*, 14 Sim., 230; *Brandon* v. *Aston*, 2 Y. & C., 24; *Whitford* v. *Prickett*, 2 Keen, 609; *Lear* v. *Leggett*, 2 Sim., 479; S. C., 1 Rus. & M., 690; *Bramhill* v. *Farris*, 14 N. Y., 41.

The same principle applies to estates for years: *Doe* v. *Carter*, 8 T. R., 61; *Rae* v. *Galliers*, 2 T. R., 133. All those cases which approve the gift of an estate to a woman during her widowhood, rest upon the same principle: *Evans* v. *Rosser*, 2 Hem. & M., 190; *Craven* v. *Brady*, L. R., 4 Eq. Cas., 209; *Pearse* v. *Owen*, 2 Haywood, N. C., 234.

22. We are told that conditions, which may result in forfeiture and limitations, may be annexed to every species of estate: 2 Cruise Dig., 3. Conditions resulting in forfeiture for nonpayment of rent could legally be attached to fee simple estates. Many other conditions were not objectionable. But no authority has come to our knoweldge which would justify a condition or limitation terminating a fee simple estate upon the event of bankruptcy or insolvency. In the case of *Churchill* v. *Marks*, 1 Col., 42, the reporter informs us that "in the course of the argument an eminent conveyancer, in answer to a question put to him by the court, stated his opinion to be that a gift

to A in fee, with a proviso that if A alien in B's lifetime the estate shall shift to B, is valid." This opinion was probably based upon those authorities which approve of partial or particular restrictions upon the voluntary alienation of fee simple estates. It is difficult to perceive any substantial distinction between the condition just mentioned and one annexed to a fee simple estate containing a proviso that if the donee should become bankrupt or insolvent in "B's lifetime the estate shall shift to B." The condition would have to be discharged within a period permissible under the rule against perpetuities. But, as already stated in the first part of this article, the authorities upon the question answered by the eminent conveyancer referred to by the reporter, are divided, and the same division would affect with doubt the proposition as applicable to involuntary alienation. As to life estates the authorities are unanimous in approving the determination of them upon any event of involuntary alienation, and nearly unanimous in like manner upon the event of voluntary alienation.

23. The aim of protecting such life estates from every kind of alienation is attempted in various ways; sometimes by unqualified terminations of the estate without any limitation over; at other times by covenants and conditions guarded by the right of entry for any breach or forfeiture. Whether the protection is perfect must depend upon the method and the language adopted by the conveyancer. When a freehold in land was given on condition, a breach of the condition did not necessarily terminate the estate.

It is true that forfeiture followed as a consequence of every breach of a condition, without any words expressly providing for it. The right of entry accrued to the grantor as the immediate consequence of every forfeiture, without any reservation of that right: 4 Kent Com., 125–6; *Police Jury* v. *Reeves*, 6 Mart. La., N. S., 221; *Jackson* v. *Allen*, 3 Cow., 220; *Hayden* v. *Stoughton*, 5 Pick., 528; *Gray* v. *Blanchard*, 8 Pick., 284. But notwithstanding the breach of condition, and the right of entry resulting to the grantor or his heirs from its breach, the estate still remained in the donee, until the grantor made actual entry or some claim equivalent thereto. The estate was not

actually defeated until the grantor chose to avail himself of the cause of forfeiture by entry or claim equivalent to it: *Chalker* v. *Chalker*, 1 Conn., 79; *Jackson* v. *Topping*, 1 Wend., 388; *Bowen* v. *Bowen*, 18 Conn., 535; *Sperry* v. *Fuller*, 8 N. H., 174; *Jewett* v. *Berry*, 20 N. H., 36; *Hamilton* v. *Elliott*, 5 S. & R., 375; *The Fifty Associates* v. *Howlands*, 11 Met., 99; *Stone* v. *Ellis*, 9 Cush., 95; *Shattuck* v. *Lovejoy*, 8 Gray, 204; *Garret* v. *Sconten*, 3 Denio, 334, *Phelps* v. *Chesson*, 12 Ired., 194; *Cross* v. *Carson*, 8 Blackford, 138; *Thompson* v. *Thompson*, 9 Ind., 323; 1 Smith's Ld. Cas., p. 105. 6 Am. Ed.

In the action of ejectment, as it prevailed at common law, the confession of lease entry and ouster, contained in the consent rule, estopped the tenant from setting up the want of an actual entry: *Little* v. *Heaton*, 2 Ld. Ray, 750. And it has been held that where ejectment is used as a remedy without the form of the consent rule, it implies all that the defendant was formerly required to confess, and may therefore be maintained in all cases in which the plaintiff has the right of entry: *Cornelius* v. *Ivins*, 2 Dutch., 376. Where the condition of avoidance was attached to an estate for years, no actual entry was necessary. The interest of the lessee was determined by any act of the lessor showing an intention to enforce the forfeiture: Co. Lit., 214 b; *Jones* v. *Carter*, 15 M. & W., 718; *Kenrick* v. *Smick*, 7 W. & S., 45; *Shaeffer* v. *Shaeffer*, 1 Wright (Penn.), 525, 592.

Now, in respect to freehold estates, it is apparent that they are not sufficiently guarded by a mere condition which, after breach, leaves the estate still in the grantee, although in a defeasible form. The forfeiture is not necessarily a termination of the estate, and nothing short of its termination will keep it from passing to the grantee's assigns in bankruptcy: *Brandon* v. *Robinson*, 18 Ves., 429; *Dick* v. *Pitchford*, 1 Div. & Batt., 480; *Doe* v. *Carter*, 8 T. R., 64; *Snowden* v. *Dales*, 6 Sim., 524. If it passed to such assigns after breach of condition, it would vest in them, of course, subject to be divested by the entry of the grantor, until the forfeiture was waived or relieved against.

24. Where, upon the happening of the condition, the estate

is limited over to some other person, its termination is no longer a matter of doubt. No entry or claim of right is necessary to vest the estate in the person to whom it is limited over after breach of condition. Unquestionably, therefore, the beneficiary's estate is sufficiently guarded against his assignees in bankruptcy by this method of limitation.

But a limitation over was not the only method of terminating the estate absolutely; it is perhaps the safest method.

An estate in land might be terminated by breach of a condition, followed by a clause or declaration of *cesser*. A provision directing that on the happening of the condition the estate should be void, and cease and determine, formerly avoided the estate *ipso facto*, without entry of the grantor, in the same manner as if it were terminated by a limitation over: 1 Coke Inst., 214 b.; 2 Cr. Dig., 39, 44; *Finch* v. *Throckmorton*, Cro. Eliz., 221; *Doe* v. *Butcher*, Douglass 50. It was found that this construction allowed the lessee to take advantage of his own wrong in avoiding estates. If, for instance a proviso of *cesser* following a breach of the condition to pay rent rendered the estate *ipso facto* void, then it was in the power of the tenant to avoid his estate and escape its burdens whenever it suited m to do so. This led to the establishment of the more modrn doctrine, that such clauses of *cesser* terminate the estate after breach of condition, only at the election of the lessor. The estate of the lessee does not become absolutely *void* upon breach of the condition, but only *voidable* at the election of the lessor: *Jones* v. *Carter*, 15 M. & W., 724; *Rede* v. *Rede*, 6 M. & S., 121; *Doe* v. *Banks*, 4 B. & Ald., 401; *Phelps* v. *Chersom*, 12 Ired., 194; *Willard* v. *Henry*, 2 N. H., 120; *King's Chapel* v. *Pelham*, 9 Mass., 50; *Tallman* v. *Snow*, 35 Me., 342; *Warner* v. *Bennett*, 31 Conn., 477. It would follow, therefore, that such a clause would not necessarily terminate the estate, nor withhold it from the assignees in bankruptcy.

It will be found on a review of the authorities, that a proviso of *cesser* may be so construed as to terminate the estate, irrespective of the action or election of the grantor. It will be so held to terminate it without any limitation over, wherever it is the undoubted intention of the grantor that it should cease

*ipso facto*. This intention may proceed from the words and the nature and object of the grant. It is, perhaps, more easily reached in personal estates than in real; for in the former the steps to enforce a forfeiture are not so marked nor necessary.

In *Rocheford* v. *Hackman*, 9 Hare, 475, the court remarks, "The true rule I take to be this: The court is to collect the intention of the testator, whether his intention was that the life interest should not continue." If that intention is clear, then the proviso of *cesser* results in an avoidance or termination of the estate upon breach of the condition, otherwise it does not: *Dommet* v. *Bedford*, 6 T. R., 684; *Evans* v. *Rosser*, 2 Henn. & M., 190; *Dickson's Trust*, 1 Eng. L. & E., 149; *Lloyd* v. *Lloyd*, 10 Eng. L. & E., 139; *Exparte Boddam*, 2 D. G. F. & J., 625; *Muggeridge's Trust*, 31 L. J. Ch., 122; 1 Preston on Estates, pp. 43, 44, 49, 50.

25. We are informed by Professor Washburn, in his valuable treatise on the law of real property, that many of the restrictions against alienation, under the form of conditions, will be construed in the nature of trusts in modern law. This modern tendency of the courts was elaborately discussed in the recent case of *Stanley* v. *Colt*, 5 Wall. U. S., 119. Indeed, it is easy to conceive of conditions annexed to estates for the sole purpose of perpetuating them for the objects for which they were granted, instead of defeating them. The intent of the donor may be lost sight of in the strict enforcement of a forfeiture for breach of such conditions. Where the language raises a technical condition, but notwithstanding the technical condition it is apparent from the whole instrument that the sole object of the condition was to preserve and perpetuate the gift to the uses and purposes to which it was consecrated, a court of equity will not allow a forfeiture to override this intent, but will construe the condition to be a trust. This is the import of the cases upon this part of the subject: 2 Wash. Real Prop., 445.

26. It has been said that a restraint on alienation might be effected by means of a bond conditioned to that effect: Co. Litt., 206; *Freeman* v. *Freeman*, 2 Vern., 233. But the better conclusion, both from authority and reason, would regard such a bond as void, if the restriction was not such as might be

imposed in the deed creating the estate: *Poale's Case*, Moore, 810; *Jervis* v. *Bruton*, 2 Vern., 251.

27. It has been intimated that the ulterior aim of this article was to ascertain to what extent property might be secured to a beneficiary against his own acts, and the claims of others which might deprive him of its use and enjoyment.

It may be premised that the estate to be secured must proceed from the bounty of others, and not be the creation and gift of the beneficiary himself. By what means a person can secure his own estate against future contingencies proceeding from his creditors or himself, is a subject the writer has neither the space nor inclination to discuss. For an opinion on this question the reader is referred to 1 Wallace, Jr., p. 119, note.

It is not conceived there is any principle in ethics opposed to one person making another a recipient of his bounty, without subjecting his generosity to the claims of creditors entirely foreign to the motives and object of his munificence. It seems that this can be done in some states to the extent of a personal support and maintenance, without resort to the conditions and limitations necessary in England and in most of the states: *Barnett's Appeal*, 46 Penn., 392. In New York, the object is attained by statutory enactments. The homestead and exemption laws, which prevail in most of the western states, rest upon the admitted justice and propriety of such provisions. The object in the aim of the writer is not limited to a mere maintenance and support of the beneficiary.

How can an interest in lands or profits thereof be best secured to him against all events of voluntary and involuntary alienation?

28. In answer to this question the following suggestions are submitted to the reader:

The interest or estate should be vested in trust, for the reason that courts of chancery in exercising their jurisdiction over trusts, are not restricted to the rules of law, but will take a wider range in favor of the intent of the parties: *Fisher* v. *Field*, 1 Johns., 495. Therefore, what is intended, will be more apt to prevail than when clothed in legal form.

In creating the trust the conveyancer should see that his

creation escapes the statute of uses—in other words, he should see that the estate given to the trustee is not of such a possessive nature, as will be executed by the statute of uses, leaving the courts of chancery no trust upon which to rest this jurisdiction: Hill on Trustees, p. 232.

Every objection proceeding from the rule against perpetuities should be avoided: 2 Bl. Com., 174; 4 Kent Com., 254. The conveyancer should bear in mind that a conditional limitation will be void, if it *may not* take place during a life or lives in being, and twenty-one years after. The fact that it *may* take place after that time renders it void as too remote: *Proprietors &c.* v. *Grant*, 3 Gray, 147. The gift should be of a life estate, and then the condition attached will necessarily be within the rule. Besides many objections to the repugnancy of the restrictions and limitations to attend it will be escaped in the selection of a life estate as disclosed in a prior part of this article.

There are only two classes of dangers to be guarded against, proceeding respectively from voluntary and involuntary alienation. Against the voluntary acts of the beneficiary, such as deeds of conveyance and of mortgage, it is easy enough to protect him. Conditions and limitations need not be resorted to, and never should be, where simple restraints against these acts will be held valid as qualifications of the trust, as it is evident they are, when attached to life estates. The deed of the beneficiary under such a restriction, will be utterly void, and will not even afford the ground of an estoppel, being executed in violation of the law of the estate: *Dongal* v. *Freyer*, 3 Mo. 40.

In protecting the beneficiary from involuntary alienation the main difficulty is experienced. It must be secured against execution sales, against assignments in bankruptcy and insolvency, and against proceedings in equity in the nature of creditor's bills and bills for the purpose of enforcing an equitable or legal claim against the trust property.

In respect to execution sales, the statutes of the particular state will have to be consulted, for even legal estates are made subject to execution only by statute. It will be found that equitable estates in land are made subject to execution in most of the states. The beneficiary may be protected from such

sales by vesting him with an equitable interest in the land or profits of the land, which shall not reach the dignity of an estate, but which may be quite as beneficial to him, notwithstanding—such an equitable interest as can be reached only by proceedings in equity. This may be effected by vesting the exclusive seizin and possession and right of possession in the trustee, with the right to collect and receive the rents and to occupy the property, excluding all power from the beneficiary to occupy or collect rents, or dispose of his interest, leaving him only a vested interest for life, not in the land, but in the net profits and rents of the land. An interest of this kind was passed upon in the case of *McIlvaine* v. *Smith*, 43 Mo., 579, and the court held that, under a statute subjecting equitable estates and interests in land to execution, it was not such an estate or interest in land as fell within the meaning of the statute, and that it could be reached only by a creditor's bill. This conclusion was reached after elaborate arguments on both sides of the question.

It may be protected from a creditor's bill by a clause of *cesser*, upon the event of judgment upon such bill, with limitation over. There is perhaps an advantage in this method of protection which must necessarily enure to the increased security of the beneficiary's estate. For if it is limited until judgment against it on such bill, while the limitation is perfectly valid and the estate must terminate upon the event of such judgment, it is not at all probable any court of equity would render such a judgment. It would only terminate the estate without giving anything to the creditors. The beneficiary would thus be allowed to enjoy his estate by reason of the court of equity declining, with good reason, to terminate it when such act of termination could give the creditors nothing whatever. See case of *Bramhall* v. *Forris*, 14 N. Y., 41, where such a limitation was held good. It is true this decision rests upon the New York statute in a great measure, but the reasoning will apply to such trusts and limitations in the absence of statute law.

It will be protected against bankruptcy and insolvency by a similar clause of *cesser* and limitation, as already shown by the authorities.

In the wording of the clause of termination it would be advisable not to subject it to the construction that an estate for life has been given, which upon the happening of bankruptcy or insolvency is defeated, but to throw the clause into the form of what is called a collateral limitation, as for instance the interest is given for life, or until bankruptcy, or insolvency, or judgment upon a creditor's bill.

All voluntary gifts should include, during the life of the donor, the right of revocation. This saves to the donor a right to withdraw his bounty when it becomes apparent, as is often the case, that he is mistaken in the object of his gift.

A. M.

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*Supreme Court of Indiana.*

STEVENS *v.* THE STATE OF INDIANA.

Upon an indictment for murder where the defence is insanity, the jury should acquit if they entertain a reasonable doubt as to the soundness of mind of the prisoner at the time of the homicide, although they believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life. He is as much entitled to the benefit of a doubt on that as on any other material fact in the case.

An instruction that "if the jury believe that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do," he was responsible for his act, is erroneous.

This was an appeal from the Vigo criminal court. The appellant was indicted for murder in the first degree, and convicted. The defence was insanity. At the instance of the prosecuting attorney, the court instructed the jury that "in order to excuse a man from killing another, on the ground of insanity, it must appear to the satisfaction of the jury that he was either absolutely insane at the time of the act, so that he did not know the difference between right or wrong, or that he was laboring under some form of monomania by which he was irresistibly impelled by an uncontrollable will to the perpetration of the act; *but such monomania must be in relation to the act of killing, for if it is monomania upon some other subject,*